

Section 25 - Contents

Appeals

| <u>Section/Sub-Section</u> | <u>Page</u> | <u>Revision Date</u> |
|---|-------------|--------------------------|
| .100 Appealable Conditions | 25-1 | 2005 |
| .110 Public Notice and Protest | 25-1 | |
| .120 Remedies and Effect of Appeal | 25-2 | |
| .200 Administrative Review | 25-4 | 2002 |
| .210 Panel Composition | 25-5 | |
| .220 Arrangements | 25-5 | |
| .230 Rules of Procedure in the Hearing | 25-5 | |
| .300 Effect of Appeal upon Award or Decision to Award | 25-6 | 2002 |
| .400 Contractual Disputes | 25-6 | 2002 |
| .410 Claims Procedures | 25-6 | |
| .420 Claims | 25-7 | |
| .430 Claims Relief | 25-7 | |
| .500 Alternative Dispute Resolution | 25-7 | 2002 |

SECTION 25

APPEALS

Sub-Section 25.100 - Appealable Conditions

Subject 25.110 - Public Notice and Protest

An IFB or RFP must contain information in the terms and conditions stating how public notice of an award or decision to award will be made and where such notice will be posted. A bidder or offeror must be afforded an opportunity to inspect bids/proposals within a reasonable time after the opening of the bids or proposals unless all bids/proposals are rejected. Otherwise, the bidder or offeror has ten days from the date of the posting of a notice of award or notice of intent to award to enter a protest. Upon receipt of a protest, a CSB official (usually the Executive Director), who was not directly involved in the procurement process, should review the procurement file and determine whether or not the decision to award was correct. The vendor (bidder or offeror) who lodged the protest must be notified of this decision within ten (10) days of receipt by the CSB of the letter of protest. If the CSB official finds the award decision to be arbitrary or capricious, the CSB must cancel the proposed award and revise it to comply with the law. If the CSB official determines the award to be proper, the bidder or offeror may appeal that decision within ten (10) days of receipt of the written decision by the CSB official.

| |
|--|
| Code of Virginia, Section 2.2-4342 (C & D) and Section 2.2-4360 |
|--|

Subject 25.120 - Remedies and Effect of Appeals

The Virginia Public Procurement Act provides remedies that are available to a vendor in which he/she may appeal various procurement-related decisions made by a public body such as a CSB. An appeal is a more formal process than a protest. An appeal may be in the form of an action brought by the vendor in the appropriate circuit court (Section 2.2-4364 of the Code of Virginia) or through an administrative appeals procedure if such a procedure has been established by the CSB (Section 2.2-4365 of the Code of Virginia). An administrative appeals procedure involves the hearing of appeals before a disinterested person or panel.

| |
|--|
| Code of Virginia, Sections 2.2-4364 and 2.2-4365 |
|--|

The following actions may be appealed:

| CSB ACTION AFFECTING VENDOR (BIDDER, OFFEROR OR CONTRACTOR) | VENDOR MAY... | IF THE APPEAL IS UPHELD, THE VENDOR'S RELIEF WILL BE... | CODE OF VIRGINIA REFERENCE |
|--|---|--|-----------------------------------|
| <u>Ineligibility</u> (Vendor refused permission to participate in a public contract). | A. Within 10 days: <ul style="list-style-type: none">• Challenge evaluation. B. Within 10 days of CSB's re-evaluation, and response, Vendor may: <ul style="list-style-type: none">• Invoke administrative procedures or,• Institute legal action. | Restoration of eligibility if CSB's action determined to be arbitrary or capricious or not in accordance with law. | 2.2-4357 |

| CSB ACTION AFFECTING VENDOR (BIDDER, OFFEROR OR CONTRACTOR) | VENDOR MAY... | IF THE APPEAL IS UPHELD, THE VENDOR'S RELIEF WILL BE... | CODE OF VIRGINIA REFERENCE |
|--|--|--|-----------------------------------|
| <u>Denial of Withdrawal of Bid</u> | <p>Within 10 days:</p> <ul style="list-style-type: none"> • Invoke administrative procedures or, • Institute legal action. | Withdrawal of bid if CSB's action determined to be arbitrary or capricious or not in accordance with law. | 2.2-4358 |
| <u>Determination of Nonresponsibility</u> - Vendor must be notified in writing stating the basis for the determination. | <p>Within 10 days:</p> <ul style="list-style-type: none"> • Invoke administrative procedures or, • Institute legal action. | May include voiding contract and/or compensating the appealing bidder for cost of performance (but not for lost profits) up to time of the decision if CSB action determined to be arbitrary and capricious. | 2.2-4359 |
| <u>Appeal of Award or Decision to Award</u> | <p>A. Within 10 days of public notice of award:</p> <ul style="list-style-type: none"> • Submit written protest stating reasons for protest. • The CSB must respond in writing | Enjoin award of contract or, if contract has been awarded, declare contract void and require compensation of performing contractor for cost | 2.2-4360 |

| CSB ACTION AFFECTING VENDOR (BIDDER, OFFEROR OR CONTRACTOR) | VENDOR MAY... | IF THE APPEAL IS UPHeld, THE VENDOR'S RELIEF WILL BE... | CODE OF VIRGINIA REFERENCE |
|--|--|--|-----------------------------------|
| | <p>within 10 days of the vendor's written protest.</p> <p>B. Within 10 days of the CSB's response, vendor may:</p> <ul style="list-style-type: none"> • Invoke administrative procedures or, • Institute legal action. | of performance up to time of such declaration. | |

Sub-Section 25.200 - Administrative Review

An administrative procedure may be established, by the CSB, to give vendors a method of appeal other than through the courts. (See Section 2.2-4365 of the Code of Virginia.) This procedure involves appointing a disinterested person or panel to hear and decide on appeals of:

- A decision to award,
- Refusal to allow withdrawal of bids,
- Disqualifications and determinations of nonresponsibility,
- Decisions on disputes arising during the performance of a contract.

Vendors may seek judicial review of administrative hearings, provided action is taken within thirty days of the receipt of a written decision by the person or panel that issued the administrative review decision. Experience has

shown, however, that most vendors accept the decision of the review person or panel.

| |
|------------------------------------|
| Code of Virginia, Section 2.2-4365 |
|------------------------------------|

Subject 25.210 - Panel Composition

If a panel is utilized, it should be appointed by the Executive Director or the Board for a specific period of time (one or more years) or to hear a specific appeal. The members of this panel should be persons who have some understanding of the procurement process but do not have any personal interest in the procurement activities of the CSB.

Subject 25.220 - Arrangements

The person or panel hearing appeals may schedule regular monthly or bi-monthly time to meet (provided any appeals are pending) or may schedule hearings on an as needed basis.

Subject 25.230 - Rules of Procedure in the Hearing

If a panel is utilized, it should (by a simple majority) adopt procedures for hearing appeals. The following rules also apply:

- Panel members must not discuss any issue on appeal with anyone other than panel members or the panel's legal counsel prior to hearing an appeal.
- Hearings before an appeals panel are not conducted as trials; however, both sides may be represented by legal counsel.
- Hearings should be informal and each party should be given time to state their positions.

- The proceedings should be recorded (electronically or in writing) and a record of the proceedings held for at least sixty days after the hearing.
- Witnesses may be permitted to testify; however, no oath is given nor can a witness be forced to testify.
- The panel may ask questions at any time but should not question parties in closed session.
- The chairperson of the panel should control the hearing.
- Hearings are open to the public; however, the panel should adjourn the hearing, after both sides have presented their positions, and reach a decision in private.

Sub-Section 25.300 - Effect of an Appeal upon an Award or Decision to Award

Pending final determination by an appeals panel or court, an appeal has no effect upon a contract that has been awarded and accepted in good faith. There must be no further action to award a contract upon which an appeal has been filed if that contract has not been awarded, however, unless a determination is made in writing that proceeding with delay is necessary to protect the public interest or unless that bid or offer would expire.

Sub-Section 25.400 - Contractual Disputes

Subject 25.410 – Claims Procedures

A procedure for consideration of contractual claims must be included in the CSB's contracts. As an alternative, this procedure may be included in the *Vendors' Guide to CSB Procurement Regulations*, and referenced in the contract. These procedures shall establish a time limit for a final decision in

writing by the CSB. If the CSB has established administrative procedures for hearing claims, these procedures shall be made available to the contractor.

| |
|--------------------------------------|
| Code of Virginia, Section 2.2-4363.B |
|--------------------------------------|

Subject 25.420 – Claims

A contractor who wishes to file a claim, whether for money or other relief, against a CSB, must give written notice of intent to file such claim "at the time of the occurrence or beginning of the work upon which the claim is based". The actual claim must be filed in writing no later than sixty (60) days after final payment. "Pendency of claims shall not delay payment of amounts agreed due in the final payment." (VPPA)

| |
|------------------------------------|
| Code of Virginia, Section 2.2-4363 |
|------------------------------------|

A contractor may not institute legal action prior to receipt of the CSB's decision on the claim unless the CSB fails to render such decision within thirty (30) days. The decision of the CSB shall be final and conclusive unless the contractor, within six month of the date of the final decision on the claim, institutes legal action as provided in the *Code of Virginia*, Section 2.2-4364.

Subject 25.430 – Claims Relief

Under certain circumstances, beyond the control of the contractor such as acts of God, sabotage, and fire or explosion not caused by negligence, the CSB may grant relief from performance of the contract or performance within the time required by the contract.

Sub-Section 25.500 – Alternative Dispute Resolution

CSBs may enter into agreements to submit disputes arising from procurement contracts to arbitration and utilize mediation and other

alternative dispute resolution procedures. These procedures should, however, be nonbonding.

| |
|------------------------------------|
| Code of Virginia, Section 2.2-4366 |
|------------------------------------|